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92-1370

Supreme Court, U.S.
FILED
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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMENDED PETITION FOR WRIT OF CERTIORARI AND APPENDIX

ROY B. WOOLSEY
Counsel of record for
Petitioner BFP, a Partnership
113 Via Venezia
Newport Beach, CA 92663
(714) 673-3731

119 pp

QUESTIONS PRESENTED FOR REVIEW

(Rule 14.1(a)

The questions presented for review are:

Does the price received at a non-collusive regularly conducted foreclosure sale establish irrebuttably the reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A)?

Does mere compliance with state laws on foreclosure prevent avoidance in bankruptcy of a non-collusive foreclosure sale as a sale for less than reasonably equivalent value under 11 U.S.C. Section 548(a)(2)?

Does the requirement in 11 U.S.C. Section 548(a)(2) of reasonably equivalent value create a federal standard concerning the power of trustees and debtors in possession in bankruptcy to avoid pre-bankruptcy foreclosure sales?

LIST OF THE PARTIES

(Rule 14.1(b))

The names of all of the parties in the proceeding appear in the caption of this case and on the cover and first page of this petition.

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In re BFP, 132 B.R. 748 (Bankr. 9th Cir. 1991); Appendix herein, p. 49.

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; a California corporation; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendants

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, BFP, a Partnership, respectfully petitions for a Writ of Certiorari to review the decision of the Circuit Court of Appeals for the Ninth

Circuit in two consolidated appeals, [1] both concerning orders in the same bankruptcy proceeding as follows:

I

STATEMENT OF GROUNDS OF JURISDICTION OF THE UNITED STATES SUPREME COURT

The jurisdiction of this Honorable Court is invoked on the grounds that:

The decision of the United States Courts of Appeal for the Ninth Circuit sought to be reviewed is in conflict with the decisions of the United States Courts

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1. Both appeals are entitled In re BFP, a partnership, Debtor; one is also entitled BFP, a Partnership v. IMPERIAL [etc.], Defendant, and PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ, Defendants-Appellees, CCA No. 91-55632, District Court No. CV--90-0436-LTL; the other is also entitled BFP, a Partnership v. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation, Appellee, CCA No. 91-56480, BAP No. CC-90-1712 JVP; both appeals are from orders of the United States Bankruptcy Court for the Central District of California in Adversary Case No. SA-89-0977JR.

of Appeal in five other circuits. It holds that the bid at a noncollusive foreclosure sale is irrebuttably presumed to be the reasonably equivalent value.

Also, the decision decides an important question of federal law which has not been, but should be, settled by this court. That question is: Can a trustee in a bankruptcy avoid a noncollusive foreclosure sale conducted in accordance with state law?

The decision interprets 11 U.S.C. Section 548 contrary to its plain, unambiguous language, contrary to the decisions of this Court on statutory interpretation.

The judgment sought to be reviewed was entered in the Court of Appeals for the Ninth Circuit on September 8, 1992. A petition for rehearing was filed timely on September 22, 1992 and denied on November 17, 1992.

The 90th day from the denial of the petition for rehearing is February 15, 1993, a court holiday, and the last day for filing this petition will be February 16, 1993.

The Supreme Court of the United States has jurisdiction as provided in 28 U.S.C. Section 1254(1) and the petition is timely as provided in Rule 13.1 and 13.4.

II

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ETC. INVOLVED

The only constitutional provisions, treaties, statutes, ordinances and regulations involved are the following and they are quoted in the Appendix hereto (App. pp. 69 to 74):

Article 1, Section 8, clause 4 of the United States Constitution gives the Congress power to enact bankruptcy laws.

11 U.S.C. Section 101(54), the second of two 54s referred to as [58](54), formerly (40), defines transfer.

11 U.S.C. Section 548(a)(2)(A), provides that the trustee in bankruptcy may avoid pre-bankruptcy transfers for less than reasonably equivalent value.

11 U.S.C. Section 1107, gives a Debtor in Possession the powers of trustee under the Bankruptcy Code.

III

STATEMENT OF THE CASE

A. FACTS

On November 24, 1989, petitioner, BFP, filed its Petition for Relief Under Chapter 11 of the U. S. Bankruptcy Code.

Within a year prior thereto, on July 12, 1989, real property of the petitioner was sold at a foreclosure sale. The

foreclosure sale was on a trust deed held by Imperial Savings & Loan Association which secured a note in the original amount of $356,250.00. That trust deed was senior to a $200,000.00 trust deed held by Sheldon and Ann Foreman.

At the sale, respondent OSBORNE and the other individual respondents, purchased the property for $433,000.00 when its value was over $700,000.00.[2]

Prior to the sale, BFP, the Debtor, Sheldon Foreman, a junior lien holder, and other persons, were litigating title to the property. The sale was originally set for December of 1988 and continued from time to time. Sheldon Foreman and BFP requested respondent Imperial Savings & Loan, the beneficiary under the trust

---

2. Not in the record: public record, a deed dated December 21, 1989, recorded January 31, 1990 as Instrument No. 057406, Office of the Recorder, Orange County, California shows respondents resold for over $659,500.00.

deed on which the foreclosure occurred, to defer the sale until after the state court determined title in the pending title action. Mr. Foreman had requested notice of the continued sale date.

The only notice of the time and place of sale given was the statutory notice that a sale was to take place in 1988 and the oral pronouncements of continuances at the time and place set for the sale and continued sales. The foreclosure sale occurred on July 12, 1989.

Petitioner filed an adversary complaint to avoid the sale. The bankruptcy court granted the motion of the individual respondents for dismissal for failure to state a claim upon which relief can be granted and later granted the motion of respondent, Imperial Savings & Loan Association, for summary judgment and judgment on the pleadings. Intervening

courts and the Court of Appeal affirmed.

B. JURISDICTION OF THE COURT OF FIRST INSTANCE AND INTERVENING COURTS.

The Bankruptcy Court had jurisdiction under 28 U.S.C. Section 157(a) and (b)(2)(H), 28 U.S.C. Section 1334(b) and 11 U.S.C. Section 548(a)(2).

Jurisdiction of intervening courts is stated in the Appendix (App. p. 82)

IV

ARGUMENT

A. RELEVANT STATUTORY AVOIDANCE POWERS.

The pertinent provisions of the statutes under consideration with the 1984 additions thereto underscored are: 11 U.S.C. Section 101(54) referred to as [58] or the second (54) which provides:

> ". . . 'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and <u>foreclosure of the debtor's equity of redemption</u>" (emphasis added to show 1984 amendment); and

11 U.S.C. Sec. 548 which provides:

> "(a) The trustee may avoid any transfer of an interest of the debtor in the property, . . . that was made . . . within one year before the date of the filing of the petition, if the debtor <u>voluntarily or involuntarily</u> -- . . .
>
> (2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and . . ." (emphasis added to show 1984 amendment).

Petitioner BFP had those powers (11 U.S.C. Section 1107).

B. THE DECISION SOUGHT TO BE REVIEWED IS IN CONFlCT WITH THE DECISIONS OF COURTS OF APPEAL OF FIVE OTHER CIRCUITS

The decision sought to be reviewed holds that there is an irrebuttable presumption that the high bid at a noncollusive, regularly conducted foreclosure sale is irrebuttably presumed to be the reasonably equivalent value. That holding conflicts with the decisions of Courts of Appeal in the Third, Fifth, Seventh, Eighth and Eleventh Circuits. Petitions for Certiorari were filed to review two of those decisions and certiorari was denied by this Honorable Court.

In First Fed Sav. & Loan Ass'n Bismark v. Hulm. (In re Hulm), 738 F.2d 323, 327 (8th Cir. 1984) cert. denied, 469 U.S. 990 105 S.Ct. 398, 83 L.Ed 2d 331 (1984), the court wisely observed:

"the Bankruptcy Code provisions are

clear . . . and direct the result we have reached. Hence, policy considerations cannot affect the outcome of the case but must be addressed, if at all, by Congress."

In the Matter of Grissom, 955 F.2d 1440 (11th Cir. 1992), in reversing a judgment avoiding the sale, the Eleventh Circuit Court adopted a rule in conflict with the decision sought to be reviewed and remanded for further consideration by the trial court (in accordance with the rule said circuit court adopted). The court said that we must endeavor to prevent foreclosure sales which unnecessarily deplete the resources of a bankruptcy estate (p. 1442), and:

"one factor in rebutting the presumption of reasonableness is . . . the foreclosure sale achieved less than 70% of the property's market value . . .,

courts should consider whether or not the foreclosing party obtained a fair appraisal, . . . the extent to which advertised, and the competitive conditions surrounding the sale", (p. 1446)

Other Courts of Appeal decisions with which the decision sought to be reviewed conflicts are:

Durrett v. Washington National Insurance Co. (In re Durrett), 621 F.2d 201 (5th Cir. 1980); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir) cert. denied, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1981).

Bundles v. Baker. (In re Bundles), 856 F.2d 815 (7th Cir. 1988). There the court said:

"Accordingly, we must reject the view that state law, either directly or as the federal rule of decision, should determine the outcome

of a bankrupt's complaint under section 548(a)(2)(A). Here, Congress has set forth a federal standard. We must give effect to that congressional will, however ambiguous its manifestation." (p. 822)

See also Barrett v. Commonwealth Federal Savings Ass'n, 939 F.2d 20, 23-25 (3rd Cir. 1991) saying that there was no irrebuttable presumption but finding reasonably equivalent value in that case and reversing the order avoiding the sale.

In addition, Judge Volinn's dissent in BAP decision in this case cited several decisions of lower courts in other circuits which are contrary to the above entitled decision (App. p. 47).

The only Court of Appeal case we find which agrees with the decision we seek to have reviewed is In the Matter of Winshall's Settlor's Trust, 758 F.2d 1136

(6th Cir. 1985) involving a transfer which occurred in 1983, before the 1984 amendments to 11 U.S.C. Sections 101 and 548.

It is difficult to reconcile the decision sought to be reviewed with In re Ehring, 900 F.2d 184 (9th Cir. 1990). There the Court of Appeal ruled that a mortgage foreclosure sale was a transfer for the purposes of 11 U.S.C. 547 (d) on avoiding pre-petition preferences. There, at page 187, the court stated that in 1984 Congress amended the definition of "transfer" to include the "foreclosure of the debtor's equity of redemption," 11 U.S.C. Section 101[58](54) and "foreclosure is a transfer for purposes of fraudulent conveyances (11 U.S.C. 548)". Thus, in Ehring the 1984 amendments were applied; an amendment to Sec. 548 to provided an irrebuttable presumption that the price bid was reasonably equivalent

was proposed and not adopted as said in Bundles v. Baker, supra. The decision which we seek to have reviewed seeks to insert such a provision in the statute.

In the decision sought to be reviewed, it was not explained how, if a mortgage foreclosure is a transfer for purposes of the fraudulent conveyance statute, the bid price establishes the reasonably equivalent value required by 11 U.S.C. 548; such a rule bars the remedies of Section 548. In 1984, Sections 101 and 548 were amended to change the rule announced in In re Madrid Lawyers Title Ins. Corp., 725 F.2d 1197 (9th Cir 1984), cert. den., 469 F.2d 1197 (1984), the appeal from 21 B.R. 424 (9th Cir. BAP 1982). The former held that a foreclosure sale was not a transfer and the latter that a foreclosure sale established the reasonably equivalent value.

C. THE DECISION DECIDES A FEDERAL QUESTION, INTERPRETATION OF FEDERAL STATUTES, IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The Opinion sought to be reviewed reads:

> "The Bundles analysis (and implicitly that of the Durrett approach) rests on a plain-language interpretation of Section 548(a)(2). Granting an irrebuttable presumption of reasonable equivalence under a noncollusive foreclosure sale, the Bundles court argues, effectively creates a judicial exception to the trustee's avoiding powers under Section 548. Id. at 823. In turn, an irrebuttable presumption undermines the ability of the trustee or debtor to recover lost equity, which is the purpose

> of the Section 548 avoiding powers. The position is persuasive, but we think that broader considerations require a different result."

We think that portion of the Opinion is an erroneous statement of the function of the courts and conflicts with cases cited above and with decisions of this Honorable Court.

In Toibb v. Radloff, 501 U.S. ____, 115 L.Ed. 2d 145, 152, 111 S.Ct. 2197, 2200 (1991), in holding that a person without a business could file under Chapter 11 of the Bankruptcy Code, the court said:

> "First, this Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative

history if the statutory language is unclear." Blum v. Stenson, 4645 U.S. 886, 896, 79 L. Ed. 2d 891, 104 S.Ct. 1541 (1984). The language of Section 109 is not unclear. Thus, although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here."

In accord: United States v. James, 478 U.S. 597, 92 L.Ed.2d 483, 493, 106 S. Ct. 3116

D. IMPORTANT QUESTIONS OF FEDERAL LAW DECIDED HAVE NOT BEEN, AND SHOULD BE, SETTLED BY THIS COURT

There are hundreds of cases decided each year in which mortgage foreclosure sales are sought to be avoided under 11 U.S.C. Section 548(a)(2). Yet the ap-

plicability of said section to foreclosure sales has never been settled by this Honorable Court.

In this case the allegations and evidence showed that the sale had been continued and the holder of the second trust deed who had reinstated the trust deed said he would do so again, requested notice of the continued sale date and was not given notice of the continued date.

Even Madrid, 21 B.R. 424, 427 (1982) said:

" '[T]here must in addition [to inadequacy of price be proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price.'".

Mere unfairness is not a state law ground. The foregoing was said in the interpreting a federal statute. In In re Tome, 113 B.R. 626 (Bktpcy. C.D. Cal.

1990) the court wisely observed that after continuances of sale noticed as required by state law, the bankruptcy court could require notice in addition to notice required by state law.

The opinion erroneously recites that a court decision that the bid price is not the reasonably equivalent value would destabilize the mortgage markets. There was no evidence before the court as to whether or not a ruling in favor of appellant would destabilize the mortgage markets.

If the court is to take judicial notice of the effect on the mortgage market, it should take judicial notice that it is to the contrary. See Shuchman, Data on the Durrett Controversy, 9 Cardoza L.Rev. 605, 616 (1987); In re General Industries, Inc., 79 B.R. 124, 133 (Bktcy. D. Mass. 1987); and In re Lindsay, 98 B.R. 983 (Bktcy. S.D.Cal.

1989). The latter case has an excellent analysis and statement of what the law should be.

The opinion of the Ninth Circuit Court sought to be reviewed relies on a quotation from pages 963-4 of an article by Professor Ehrlich in 71 Va.L.R. 932, pp. 965-967. If it is to be considered by any Court, the Court should also consider our quotations from pages 965 to 967 of that article which appears in our Appendix (App. pp. 75-81).

V

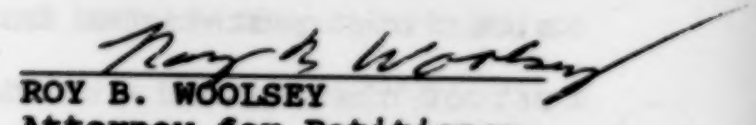
CONCLUSION

It is requested that this Honorable Court grant certiorari to review the decision of the Court of Appeals in the consolidated cases described in footnote 1, on page 2 hereof, conform this case to the decisions of the other circuits, require it to conform to rules of statu-

tory construction settled by this court, and require sales efforts such as advertising and notice of continued sale dates before there can be a presumption that a bid at a foreclosure sale is the reasonably equivalent value.

Dated: February 5/12, 1993

RESPECTFULLY SUBMITTED,



ROY B. WOOLSEY
Attorney for Petitioner

D113:BFPSC.P89

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COPY OF OPINION TO BE REVIEWED
974 F.2d 1991, CCA 9th -- 1992 --

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: BFP, a Partnership, Debtor.	
BFP, a Partnership, Appellant/Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, Defendant. and PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ, Defendants-Appellees	No. 91-55632 DC No. CV-90-0436-LTL OPINION

Appeal from the
United States District Court
for the Central District of California
Lawrence T. Lydick,
District Judge, Presiding

In re:	)	
	)	
BFP, a Partnership,	)	
	)	
Debtor.	)	
	)	
BFP,	)	No. 91-56480
Appellant,	)	
	)	BAP No.
v.	)	CC-90-1712-JVP
	)	
IMPERIAL SAVINGS & LOAN ASSOCIATION,	)	
	)	
Appellee.	)	

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Jones, Volinn, and Perris,
Judges Presiding

Argued and Submitted
July 9, 1992 -- Pasadena, California

Filed September 8, 1992

Before: Joseph T. Sneed and Dorothy W. Nelson, Circuit Judges and John M. Roll *

OPINION

SNEED, Circuit Judge:

This is a consolidated appeal by BFP, a California partnership, from an

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* Honorable John M. Roll, United States District Judge for the District of Arizona sitting by designation

adversary proceeding in the bankruptcy court instituted to avoid a transfer of property under the avoiding powers of 11 U.S.C. Section 548(a)(2)(A). We affirm.

I.

FACTS AND PROCEEDINGS BELOW

In July of 1987, Wayne and Marlene Pedersen and Russell Barton entered into a written arrangement involving the purchase of a home in Newport Beach, California owned by Sheldon and Ann Foreman. The Pedersens were to buy the Foreman home for $356,250 plus some rare coins, whose value is not disclosed in the pleadings. The Pedersens planned to raise the $356,250 from a bank loan, itself to be secured by a first deed of trust on the property. It is reasonable to assume that the Foremans believed their home had a value in excess of $356,250. The precise extent to which

the Pedersens and Barton shared that view is less certain.

The Pedersens also agreed to give Barton a 180-day option to purchase the home, after the Pedersens themselves effected its purchase from the Foremans. Barton planned to remodel. In exchange for the option to buy, Barton agreed to pay the Pedersens 25% of any profits earned on the home's resale.

In August of 1987, after the property went into escrow, a shadow passed over the transaction. Local newspapers reported that Wayne Pedersen was under investigation for fraudulent sales of rare coins. This caused the Foremans some trepidation, and all the parties agreed orally to structure a somewhat different arrangement. Instead of the Pedersens being the buyers, a partnership, BFP, was formed. Its sole partners were Wayne and Marlene Pedersen

and Russell Barton. Similar to the prior agreement between the Pedersens and Barton, the partnership agreed to divide profits from the resale of the Foreman home 75% to Barton and 25% to the Pedersens. The following transactions then took place.

On August 27, 1987, the Foremans deeded the property to the Pedersens. On the same day, the Pedersens then deeded the property over to BFP, the partnership. The Pedersens borrowed $356,250 from appellee Imperial Federal Savings Association[1] and BFP "borrowed" $200,000.00, in the form of a six-month promissory note, from the Foremans. Ostensibly, the note served as replacement value for the rare coins. Both

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1. Since the commencement of this suit, the Resolution Trust Corporation has been appointed receiver of Imperial. For convenience, we will continue to refer to the savings association by its former name.

loans were secured by deeds of trust on the home, Imperial's being a first, the Foremans' a second.

The Foremans' earlier misgivings proved well founded. Despite their initial conveyance to BFP, the Pedersens conveyed the property a second time to a concern called Off Road Vehicles--Recreation and Family Campground, Inc. BFP and the Foremans sued in state court to quiet title to the property.

While the state court suit was pending, Imperial, whose loan was not being serviced, instituted foreclosure proceedings on the property. Off-Road then filed an involuntary bankruptcy petition on behalf of BFP in order to secure an automatic stay of the foreclosure. BFP moved to dismiss the involuntary petition, and Imperial moved to lift the automatic stay. The bankruptcy court granted both motions; it lifted the stay

on June 12, 1989, and dismissed the involuntary case on June 14, 1989.

With the stay lifted, Imperial continued its foreclosure of the property. On July 12, 1989, Imperial conducted a foreclosure sale and sold the property to appellee Paul Osborne for $433,000. Osborne had no notice of the title dispute, and bought the property in good faith. BFP alleges that the property was actually worth over $725,000 at the time of the sale to Osborne. As a result, BFP claims that its equity in the property was lost.

On July 21, 1989, the state court in the suit to quiet title announced its intended ruling. The court decided to rescind the 1987 conveyance from the Foremans to the Pedersens and to award both the Foremans and Barton damages against the Pedersens. The court entered final judgment on October 12, 1989.

On August 18, 1989, after the state court announced its quiet title decision, BFP filed a second state court action which sought to rescind Imperial's conveyance to Osborne. The Foremans joined this action because, while their initial conveyance had been rescinded by the quiet title action, their ownership interest in the property stood to be destroyed by Osborne's good faith purchase of the property at Imperial's foreclosure sale. The stated grounds of this second state court action were that Imperial did not comply with the foreclosure procedures set forth in California Civil Code Section 2924 et seq.

On October 25, 1989, BFP filed for Chapter 11 bankruptcy, which caused the second state court suit to be stayed. BFP then instituted the adversary proceeding that is the subject of this

appeal.

The bankruptcy court on March 6, 1990 dashed BFP's and, no doubt, the Foremans' hopes when it dismissed the adversary complaint against Osborne for failure to state a claim. The court noted that BFP did not make any allegation that Imperial's trustee sale was in violation of California law, nor did BFP assert that the sale was conducted fraudulently or collusively. The court also found that Osborne was a bona fide purchaser for value, without notice, and ruled that there was no legal authority to set aside the sale as to Osborne. The district court summarily affirmed this dismissal, and BFP appealed on May 9, 1991.

The adversary proceeding continued to the summary judgment stage against Imperial and on July 10, 1990, the bankruptcy judge granted summary judgment in

favor of Imperial. It based its decision on two grounds. First, it held that there was no transfer of an interest in property by virtue of the first state court judgment, which rescinded the deed from the Foremans to the Pedersens. Wrote the court: "[T]he Pedersons [sic] did not have an interest in property when they purported to transfer the title to the property to BFP. Therefor [sic], BFP never received good title." Alternatively, the bankruptcy court ruled that Imperial's sale to Osborne could not be avoided under 11 U.S.C. Section 548(a)(2)(A) because "a reasonably equivalent value was received in exchange for the transfer, [and] the nonjudicial foreclosure sale was non-collusive and regularly conducted."

In a published opinion, In re BFP, 132 B.R. 748 (Bankr. 9th Cir. 1991), the bankruptcy appellate panel affirmed. The

court applied its previous decision, In re Madrid, 21 B.R. 424 (Bankr. 9th Cir. 1982), aff'd on other grounds, 725 F.2d 1197 (9th Cir.), cert. denied, 469 U.S. 833 (1984), which held that the sale price in a noncollusive, regularly conducted foreclosure sale is, as a matter of law, reasonably equivalent value for purposes of 11 U.S.C. 548(a)(2)(A). Judge Volinn, who had dissented in Madrid, once more dissented. See In re BFP, 132 B.R. at 751-52 (Volinn, Jr., dissenting). This time he argued that Madrid should be overruled in light of more recent decisions from courts of appeals in other circuits, which themselves followed the suggested course of his earlier Madrid dissent. BFP appeals the bankruptcy appellate panel decision. We must now decide whether the bankruptcy court, the district court, and the bankruptcy appellate panel were correct in

letting Imperial's foreclosure and Osborne's purchase of the Foreman home stand.

II.

JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. Section 158(d).

The bankruptcy appellate panel's decision in the Imperial case and the district court's summary affirmance in the Osborne case are reviewed de novo. Findings of fact in the bankruptcy court are reviewed for clear error. We may affirm on any ground finding support in the record. See In re Siriani, No. 91-15856, slip op. 6545, 6550 (9th Cir. June 12, 1992).

III.

FRAUDULENT TRANSFERS UNDER SECTION 548(a)(2)

[1] Section 548(a)(2) of the

Bankruptcy Code sets forth the avoiding powers of a bankruptcy trustee as they relate to fraudulent transfers of a debtor's interest in property. To avoid a transfer under this section, four elements must be satisfied:

(1) the debtor must have an interest in the property,

(2) the debtor must have been insolvent at the time of the transfer or become insolvent as a result of the transfer,

(3) the transfer must have occurred within one year of the bankruptcy filing; and

(4) the debtor must have received "less than a reasonably equivalent value" for the transfer.

See In re Bundles, 856 F.2d 815, 816-17 (7th Cir. 1988). Only the first and last elements are disputed on this appeal.

A. Did BFP have a property interest in the Foreman home?

[2] Whether a debtor has a property interest under 11 U.S.C. Section 548 is a question determined by state law. In re Torrez, 63 B.R. 751, 754 (Bankr. 9th Cir. 1986). As noted above, the bankruptcy court found that BFP did not obtain good title to the Foreman home by virtue of the state court ruling rescinding the deed from the Foremans to the Pedersens. Imperial contends that the bankruptcy court was correct, and offers a number of arguments in support of its position.[2]

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2. For instance, Imperial posits that BFP would be unable to obtain "bona fide purchaser" status from the Pedersen-to-BFP grant because the Pedersems were general partners of BFP. BFP, asserts Imperial, is therefore imputed with knowledge of the Pedersen's fraudulent intent by virtue of the California partnership law, see Cal. Corp. Code Section 15012, and the Pedersen-to-BFP deed is consequently avoidable to the same extent as the Foreman-to Pedersen deed, see Perry v. O'Donnell, 749 F.2d 1346, 1349 (9th Cir. 1984).

[3] Legal arguments aside, however, the judgment of the state court clearly quieted title in favor of both the Foremans and BFP as against all other parties in the state court action. After first rescinding the original deed from the Foremans to the Pedersens, the state court then ruled as follows: "It is further ordered, adjudged and decreed that plaintiffs, B.F.P., Sheldon L. Foreman and Ann Fant Foreman are the sole owners of said real property in fee simple, and Sheldon L. Foreman and Ann Fant Foreman are the owners of the note secured by deed of trust ... dated September 16, 1987" (emphasis supplied). The September 16, 1987 deed of trust secures BFP's $200,000 note given to the Foremans. Thus, the state court judgment settled title in favor of the Foremans and BFP as co-owners in fee simple, and, in addition, validated the Foreman's

second deed of trust against BFP's fee interest securing the $200,000 debt owed by the partnership to the Foremans.

[4] Admittedly, the state court's reasoning is difficult to follow.[3] But the judgment is valid, and we must give

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3. The state court seems to hold that the Foreman-to-Pedersen deed became avoidable by a failure of consideration caused by the Pedersens. However, the Foremans received over $365,000 of loan proceeds upon their transfer of title to the Pedersens. There is additional language in the judgment that implies that the failre of consideration took place as a result of the Pedersen's subsequent breach of both the BFP partnership agreement and contractual duties owed to the Foremans. How this breach would cause a failure of consideration, as that concept is normally understood, or how the breach would affect the original grant, is not explained.

Imperial describes the state court judgment as one which found fraud perpetrated by the Pedersens which in turn induced the Foremans to deed over their property. This is certainly a plausible reading of the facts, but it is just not supported by the state court judgment or its official "Explanation of Decision." Indeed, the state court flatly ruled that "there was no such conspiracy to defraud" on the part of the Pedersens.

it full faith and credit. It follows that BFP did indeed have a property interest in the Foreman home at the time of Imperial's foreclosure sale to Osborne.

B. Did BFP receive "reasonably equivalent value" under 11 U.S.C. Section 548(a)(2)(A)?

[5] The bankruptcy appellate panel below applied its earlier decision in Madrid and held that the price received at a non-collusive, regularly conducted foreclosure sale establishes as a matter of law reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A). Although the issue is a close one, we agree that the Madrid rule is the appropriate interpretation of the Bankruptcy Code. As the Sixth Circuit has stated, "[T]he better view is that reasonable equivalence for the purposes of a foreclosure sale under Section 548(a)(2)(A) should be

consonant with the state law of fraudulent conveyances." In re Winshall Settlor's Trust, 758 F.2d 1136, 1139 (6th Cir. 1985) (citing Madrid). We necessarily part from the positions taken by the Fifth Circuit in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980[4] and the Seventh Circuit in

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4. The "Durrett rule" holds that so long as the debtor received at least 70% of fair market value, the sale cannot be avoided under Section 548(a)(2)(A). As has been pointed out elsewhere, the actual holding of Durrett does not explicitly establish a 70% floor. Rather, the court merely noted that it was unable to find a case that had approved a transfer "for less than 70 percent of the market value of the property." 621 F.2d at 203. For analytical purposes, it is nonetheless useful to treat Durrett as standing for the notion that some level of price inadequacy will result in a fraudulent transfer under Section 548(a)(2)(A). This is the interpretation given Durrett by numerous bankruptcy courts, and, historical accuracy aside, is in fact the Durrett rule." See Alan S. Gover & Glenn D. West, The Texas Nonjudicial Foreclosure Process--A Proposal to Reconcile the Procedures

Bundles.[5]

The Bundles analysis (and implicitly that of the Durrett approach) rests on a

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...Continued...

Mandated by State Law with the Fraudulent Conveyance Principles of the Bankruptcy Code, 43 Sw.L.J. 1061, 1062 (1990).

5. The Bundles court rejected both Durrett and Madrid, opting instead for what it called a middle ground approach. Under the Bundles formulation, "[r]easonable equivalence should depend on all the facts of each case." 856 F.2d at 824. The court felt that the "starting point" of the inquiry should be the fair market value, but listed also as relevant the market value as affected by the "fact of foreclosure." In the "usual circumstances," the court opined, a rebuttable presumption of reasonable equivalence would be appropriate. Nonetheless, state-specific foreclosure procedures might alter the analysis if they were not designed to "return to the debtor-mortgagor his equity in the property." Id. Thus it is proper to examine state foreclosure procedures and inquire whether "there was a fair appraisal of the property, whether the property was advertised widely, and whether competitive bidding was encouraged." Id. Still, it is necessary "to accord respect to the state foreclosure sale proceedings." Id. at 825.

plain-language interpretation of Section 548(a)(2). Granting an irrebuttable presumption of reasonable equivalence under a noncollusive foreclosure sale, the Bundles court argues, effectively creates a judicial exception to the trustee's avoiding powers under Section 548. Id. at 823. In turn, an irrebuttable presumption undermines the ability of the trustee or debtor to recover lost equity, which is the purpose of the Section 548 avoiding powers. The position is persuasive, but we think that broader considerations require a different result.

As has been widely recognized, allowing a bankruptcy court to undo a foreclosure sale carries with it the strong potential to destabilize state mortgage transactions. Professor Ehrlich summarizes the result succinctly:

"[T]he prospect that trial courts

will determine reasonable equivalence on a case-by-case basis is untenable from both federal and state perspectives. From a state viewpoint, an ad hoc approach produces intolerable uncertainty regarding the finality of any purchase at a foreclosure sale even if the price paid at the sale is close to, but not equal to, the retail market value. From a federal perspective, this uncertainty undermines the price-maximizing objectives of section 548(a)(2) because potential buyers will discount their assessment of the true market value of the property to reflect this uncertainty."

Scott B. Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, Va.L.Rev. 933, 963-64 (1985).

Professor Ehrlich's observations are persuasive. It makes little sense to interpret Section 548(a)(2)(A) in a way that will likely discourage healthy foreclosure bidding.

[6] Perhaps more importantly by following the Madrid formulation we are able to give a reasonable meaning to Section 548 without unduly upsetting local real estate markets or state law. Unlike the Bundles court, we see the issue as both one of statutory interpretation and the growing tension between preemption and the requirements of a vigorous federal system. The Supreme Court has recently reminded us that our interpretation of federal statutes should be tempered with due regard for traditional state areas of regulation. See Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 2617-18 (1992). Thus, by interpreting Section 548 in accordance

with the Madrid formulation, we are able to balance bankruptcy policy and comity concerns.[6]

We therefore hold that the price received at a noncollusive, regularly conducted foreclosure sale establishes irrebuttably reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A).[7]

AFFIRMED.

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6. We should note also that the Madrid formulation has been adopted by the National Conference of Commissioners on Uniform State Laws, see Unif. Fraudulent Transfer Act Section 3(b) (1984), and has been recommended by the American Bar Association, see 1983 A.B.A. Sec. of Real Prop. Rep. 106B.

7. We also agree with the lower courts that the applicable state procedures were complied with in this case and that BFP received adequate notice of the forclosure under California law.

JUDGMENT OF CCA 9TH FILED SEPTEBMER 8, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

c No. 91-55632

CT/AG#: CV-90-0436-LTL

In re: BFP, a partnership

Debtor

BFP, a Partnership

Plaintiff - Appellant

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION

Defendant

and

PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ

Defendants - Appellees

No. 91-56480
CT/AG#: CV-90-1712-JVP

In re BFP

Debtor

BFP

Appellant

v.

IMPERIAL SAVINGS & LOAN ASSOCIATION

Appellee

APPEAL FROM the United States District Court for the Central District (Santa Ana).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District (Santa Ana) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered September 08, 1992.

ORDER OF CCA 9TH DENYING PETITION FOR REHEARING, NOVEBMER 17, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: BFP, a Partnership, Debtor.	)	
BFP, a Partnership, Appellant/Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, Defendant. and PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ, Defendants-Appellees	) No. 91-55632) DC No. CV-90-0436-LTL) ORDER	
In re: BFP, a Partnership, Debtor.	)	
BFP, Appellant,	) No. 91-56480	
v. IMPERIAL SAVINGS & LOAN ASSOCIATION, Appellee.	) BAP No. CC-90-1712-JVP	

Before: Joseph T. Sneed and Dorothy W. Nelson, Circuit Judges and John M. Roll *

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

---

* Honorable John M. Roll, United States District Judge for the District of Arizona sitting by designation

COPY OF BANKRUPTCY COURT ORDER

FILED
MAR 6, 1990

MICHAEL R. SMENT, ESQ. - Bar #90949
RICH & EZER
A Law Corporation
Eleventh Floor
1840 Century Park East
Los Angeles, California 90067
(213) 277-7747

Attorneys for Defendants
PAUL OSBORNE, et al.

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	) Bk. No. SA89-) 06771-JR
BFP, a Partnership,	)
Debtor.	) CHAPTER 11
	) Adv. No. SA89-
BFP, a Partnership,	) 0977-JR
Plaintiff,	) ORDER DISMIS-) SING DEBTOR'S
vs.	) COMPLAINT TO) DECLARE TRANS-
IMPERIAL SAVINGS & LOAN ASSOCIATION; a California corporation; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCY; and DOES 1 to 10,	) FER OF REAL) PROPERTY NULL) AND VOID)) Hearing --)) Date: 2-6-90) Time: 10:00 am
Defendants.	) Place CTRM 520

The Motion to Dismiss Complaint for

Failure to State a Claim Upon Which Relief Can be Granted brought by defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE J. CRUZ, AND RICHARD MARCZ (erroneously sued herein as Richard March) came on for hearing on February 6, 1990 at 10:00 a.m. in the above-entitled United States Bankruptcy Court before the Honorable John Ryan, United States Bankruptcy Judge, presiding. Movants appeared through their counsel, Michael R. Sment of Rich & Ezer. Debtor BFP, a Partnership, appeared through its counsel. Roy B. Woolsey of Woolsey, Angelo & Thatcher. No other appearances were made, nor pleadings filed, in connection with the Motion to Dismiss.

The Court, having considered the Motion to Dismiss and the declaration and exhibits attached thereto, the pleadings and records on file in connection with

this adversary action, the pleadings and records on file in connection with the above-entitled Bankruptcy case, the pleadings and records on file in connection with Movants' Motion for Relief from Automatic Stay herein (Ref. No. M9-0419-JR), the opposition filed by Debtor, and the arguments of counsel, and with good cause appearing therefor, makes it Order as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Debtor's Complaint To Declare Transfer Of Real Property Null And Void, And To Vacate And Set Aside Trustees' Deed of Trust, And For Damages fails to state a claim upon which relief can be granted against Movants, and each of them. Debtor has failed to make any allegations that the involved trustee's sale was not in compliance with California state law, nor any allegations that said trustee's sale was conducted collu-

sively or fraudulently. Debtor also admits that Movants, as the purchasers at the trustee's sale, were bona fide purchasers who had no other involvement with the foreclosure proceedings or trustee's sale. Debtor has failed to present any authority whatsoever to authorize setting aside the trustee's sale as to Movants, as good faith purchasers. The authorities cited by Debtor in its opposition are not controlling or binding upon this Court. In Re Madrid (9th Cir. BAP 1982) and In Re Ehrling (9th Cir. BAP 1988) constitute the controlling decisions within the Ninth Circuit as to setting aside foreclosure sales pursuant to 11 U.S.C. Section 548. Debtor's Complaint To Declare Transfer Of Real Property Null And Void, etc. is hereby dismissed with prejudice as to Movants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE J. CRUZ and RICHARD MARCZ.

DATED: MAR 6, 1990

(SIGNED) JOHN E. RYAN
UNITED STATES BANKRUPTCY JUDGE

COPY OF BANKRUPTCY COURT FINDINGS OF FACT

FILED
JULY 10, 1990
CLERK, U. S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

LAW OFFICES OF EDWARD G. SCHLOSS
MARY C. CAROOM, ESQUIRE # 139155
1801 AVENUE OF THE STARS, SUITE 1148
LOS ANGELES, CALIFORNIA 90067
(213) 277-4848
C0111/BB

Attorneys for Movant/Defendant
IMPERIAL SAVINGS & LOAN ASSOCIATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	) Bk. No.
	) SA 89-06771 JR
BFP, a Partnership,	)
	) Adv. No.
Debtor.	) SA 89-0977 JR
_____	)
	) Chapter 11
BFP, a Partnership,	)
	) FINDINGS OF
Plaintiff,	) FACT AND CON-
	) CLUSIONS OF
vs.	) LAW RE MOTION
	) FOR JUDGMENT
IMPERIAL SAVINGS & LOAN	) ON PLEADINGS
ASSOCIATION, a California	) AND/OR
corporation; PAUL OSBORNE	) SUMMARY
WILLIAM LITTLE; DENNIS	) JUDGMENT
ROY; ARTHUR RITZ; JOSE	)
CRUZ; RICHARD MARCZ; and	) Continued
Does 1 to 10,	) Hearing -
	)

Defendants.) Date: 6-18-90
) Time: 3:30 pm
) Place:U.S.
) Bankruptcy Ct
)

Movant's Motion for Summary Judgment came on regularly for Hearing on June 18, 1990, at 3:30 P.m., before the Honorable John Ryan. Movant/Defendant IMPERIAL SAVINGS & LOAN ASSOCIATION ("IMPERIAL" herein) appeared by and through its counsel of record, Mary C. Caroom, Esq. of the Law Offices of Edward G. Schloss. Debtor BFP, a Partnership ("BFP" herein) appeared through its counsel, Roy Woolsey, Esq.

Based upon the pleadings on file in this matter, the Statement of Uncontroverted Facts and Conclusions of Law and other good cause appearing, the Court makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Wayne L. Pederson and Marlene

Pederson ("Pedersons" herein) executed a deed of trust in the first position encumbering real property that is the subject of the property of this litigation. Said trust deed secured a promissory note for $356,200.00.

2. Said trust deed was recorded on August 25, 1987 as Instrument No. 87-481935.

3. IMPERIAL was the successor in interest to Loan Marketing and Brokers Services, Inc., the original beneficiary under the trust deed, by assignment recorded August 25, 1987.

4. BFP purports to hold title by virtue of a grant deed form the Pedersons to BFP, dated August 25, 1987 and recorded in or around September, 1987.

5. The Pedersons purported to hold title to the subject property by virtue of a grant deed from the Foremans to the Pedersons recorded August 25, 1987.

6. BFP is a partnership composed of Russell Barton and the Pedersons.

7. Prior to July, 1989 BFP and others filed a Superior Court Action as to the subject property in the Superior Court for the County of Orange, case No. X-54-16-04.

8. After a trial on the merits an Announcement of Tentative Decision was filed which states that the Deed form the Foremans to the Pedersons recorded August 25, 1987, was rescinded as between the parties and title was quieted in favor of the Foremans.

9. On October 12, 1989, a Statement of Decision was filed in the aforementioned action which states that the transfer of title to the Subject property from the Foremans to the Pedersons was rescinded as between the parties and title was quieted in favor of the Foremans.

10. On October 12, 1989, a Judgment was filed in the aforementioned action which states that deed from the Foremans to the Pedersons was rescinded as between the parties and that the Pedersons have no right, title estate or interest in said real property.

11. When the trust deed loan went into default, IMPERIAL elected to initiate foreclosure proceedings. A Notice of Default was recorded on July 29, 1988.

12. A Trustee's Sale was originally scheduled for December 29, 1988. Notice of the Sale was published for three consecutive weeks as required by the laws of the State of California.

13. Said Trustee's Sale was postponed from time to time when IMPERIAL learned that on or around December 21, 1988 an involuntary Chapter 11 proceeding had been commenced against BFP.

14. The involuntary bankruptcy was

dismissed at BFP's own request by Order entered on June 14, 1989.

15. In reliance on said Dismissal Order, IMPERIAL proceeded to hold the Trustee's Sale, on July 112, 1988. The property was sold to third party purchasers for $433,000.00. A cash payment was tendered by the purchasers immediately following the sale, and a Trustee's deed upon sale was executed.

16. IMPERIAL did not have any business relationship with the third party purchasers at any time prior to the Trustee's Sale of the subject property, nor did IMPERIAL receive any benefit by virtue of the fact that the property was purchased by a third party at the Trustee's Sale.

CONCLUSIONS OF LAW

1. BFP has no claim against IMPERIAL under 11 U.S.C. Section 548(a)(2) because there was no transfer of an

interest of property of the Debtor when the property was sold at the sale. This is based on the ground that the Pedersons did not have an interest in the property when they purported to transfer the title to the property to BFP. Therefore, BFP never received good title.

2. Even if a transfer of an interest of property of the Debtor occurred at the sale, a reasonably equivalent value was received in exchange for the transfer, because the nonjudicial foreclosure sale was non-collusive and regularly conducted.

3. The Debtor's Complaint to Declare Transfer of Real Property Null and Void, and to Vacate and Set Aside Trustee's Deed of Trust, and for Damages fails to state a claim upon which relief can be granted against Movant and said Complaint is hereby dismissed with prejudice as to Movant.

Dated: 10 JUL 1990

JOHN E. RYAN
UNITED STATES BANKRUPTCY JUDGE

COPY OF DECISION OF DISTRICT COURT
(NOT PUBLISHED)

FILED APR 8, 1991
ENTERED APR 9, 1991
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	)	
	)	No. SA CV 90-
BFP, a Partnership,	)	436-LTL
	)	
Debtor.	)	
	)	
BFP, a Partnership,	)	DECISION
	)	
Appellant,	)	
	)	
vs.	)	
	)	
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; PAUL OSBORNE WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCY, and DOES 1 to 10,	)	
	)	
Appellees.	)	

This matter is here on a timely appeal by Appellant BFP, a Partnership ("BFP") from a March 6, 1990 Order of the

U.S. Bankruptcy Court dismissing an adversary complaint of BFP with prejudice. Jurisdiction is found pursuant to 28 U.S.C. Section 158(a).

In our view the Bankruptcy Court's findings of facts stated in the Order are not clearly erroneous. We also conclude after de novo review that the court below has ascertained and applied the existing law of this Circuit correctly in reaching its legal conclusions and its decision.

The March 6, 1990 Order of the Bankruptcy Court accordingly is affirmed.

DATED: This 8th day of April, 1991.

Lawrence T. Lydick
United States District Judge

copies to:

Roy B. Woolsey
WOOLSEY, ANGELO & THATCHER
2099 San Joaquin Hills Road
Newport Beach, CA 92660

Michael R. Sment
RICH & EZER
Eleventh Floor
1840 Century Park East
Los Angeles, CA 90067

HONORABLE JOHN E. RYAN
Federal Bldg.
34 Civic Center Plaza
Room 506
Santa Ana, CA 92701

COPY OF ORDER OF DISTRICT COURT
ON MOTION FOR REHEARING
(NOT PUBLISHED)

FILED MAY 6, 1991
ENTERED MAY 6, 1991
CLERK, US. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE

In re:	)
BFP, a Partnership,	) No. SA CV 90-436-LTL
Debtor.	) THIS CONSTITUTES NOTICE OF ENTRY AS REQUESTED BY FRCP. RULE 77(D)
BFP, a Partnership,	)
Appellant,	)
vs.	) O R D E R
PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,	)
Appellees.	)

This matter is here on a motion by appellant BFP, a Partnership, ("Appellant") for rehearing of its appeal of the bankruptcy court's ruling.

Appellant's request for a rehearing of its appeal is premised on Bankruptcy

Rule 8015 which provides that a motion for rehearing may be made within ten days after entry of judgment on an appeal from the bankruptcy court. Such a motion should be denied absent proof of the existence of specific points of law or fact overlooked or misapprehended by the Court. Armster v. U. S. District Court, 806 F.2d 1347, 1356 (9th Cir. 1986); see also Federal Rule of Appellate Procedure 40(a).

Appellant asserts that this Court's decision was in fact based on a clear error of law. The two arguments offered by appellant in support of its motion fail to justify this claim. Specifically, appellant requests that the Court grant a rehearing so that the Court can "consider the soon-to-be-decided decision by the Bankruptcy Appellate Panel as to what the law of the 9th Circuit is." However, appellant does not

explain how this Court's failure to postpone its decision until after a decision by the BAP on a separate appeal may have resulted in a misapplication of the law. Appellant also has not shown that this Court would have been bound by the BAP's decision if it had preceded this Court's ruling. Similarly, appellant has not demonstrated that any subsequent decision by the BAP will invalidate this Court's decision.

The second ground relied on by appellant in support of its motion for a rehearing is the Court's alleged failure to consider the decision in In re Tome, 113 B.R. 626 (Bankr.C.D.Cal. 1990). In Tome a bankruptcy court held that a foreclosure sale could be set aside where a chapter 13 debtor received insufficient notice of a pending foreclosure sale. Appellant contends that the debtors in this action likewise received insuffi-

cient notice of the foreclosure sale for their property. Appellant asserted this point for the first time during oral argument without explanation for its failure to include it in its opening brief. In any event, the facts and law in Tome are clearly distinguished from those of the instant action.

Appellant thus fails to establish that the Court either misapplied or overlooked any point of law when it affirmed the bankruptcy court's ruling. In addition, appellant's motion offers no new material facts that would alter this Court's original ruling. Accordingly, appellant's motion for a rehearing is denied.

The Clerk of the Court will serve copies of this Order by United States mail upon counsel of record.

DATED: This 6 day of May, 1991.

Lawrence T. Lydick
United States District Judge

copies to:
Roy B. Woolsey
WOOLSEY, ANGELO & THATCHER
2099 San Joaquin Hills Road
Newport Beach, CA 92660

Michael R. Sment
RICH & EZER
Eleventh Floor
1840 Century Park East
Los Angeles, CA 90067

COPY OF OPINION OF THE BAP

FILED
November 5, 1991 cd
NANCY B. DICKERSON, CLERK
U. S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE

PANEL FOR THE NINTH CIRCUIT

In re:	) BAP No.
	) CC-90-1712-JVP
BFP, a Partnership,	)
	) Bk. No.
Debtor.	) SA-89-06771-JR
	)
	) Adv. No.
BFP, a Partnership,	) SA-89-0977-JR
	)
Appellant/Plaintiff,	) O P I N I O N
	)
vs.	)
	)
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation,	)
	)
Appellee/Defendant.	)

Argued and Submitted
on March 20, 1992, at Pasadena, California

Filed: NOV. 5, 1991

Appeal from the United States Bankruptcy Court for the Central District of California

Honorable John E. Ryan, Bankruptcy Judge, Presiding

Before: JONES, VOLINN, and PERRIS, Bankruptcy Judges

JONES, Bankruptcy Judge:

Appellee/Defendant Imperial Savings & Loan Association ("Imperial") sold real property at a foreclosure sale. Thereafter Appellant/Plaintiff BFP filed its Chapter 11 petition and brought an adversary suit to avoid the sale as a Section 548(a)(2) transfer for less than reasonably equivalent value. Imperial moved for and was granted summary judgment. BFP appealed. We AFFIRM.

BACKGROUND

In 1987 several parties got together to buy the home of Sheldon and Ann Foreman in Newport Beach, California, planning to remodel and sell it. Wayne Pedersen was to be the purchaser, but after the property entered escrow the agreement was orally changed. Instead of Wayne Pedersen being the sole buyer, a

partnership, BFP, was formed.[1] On August 27, 1987, the Foremans deeded the property to Wayne and Marlene Pedersen, who on the same day deeded the property to BFP. Wayne Pedersen borrowed $356,250[2] from Imperial and BFP borrowed $200,000 [3] from the Foremans to make the purchase--both loans were secured by deeds of trust.

Despite the fact that the Pedersens had conveyed the property to BFP, they subsequently conveyed the property to another entity, Off-Road Vehicles--Recreation & Family Campground, Inc. ("Off-

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1. The BFP partnership originally consisted of Wayne and Marlene Pedersen and Russell Barton.

2. This loan was secured by a first deed of trust, apparently with Wayne Pedersen as trustor and Imperial's predecessor in interest as beneficiary. The deed was recorded August 25, 1987.

3. This loan was secured by a second deed of trust, apparently with BFP as trustor and the Foremans as the beneficiaries.

Road"). BFP and the Foremans brought suit against Off-Road in state court to quiet title.

Before the state court could decide the case, Imperial entered a notice of default under the first deed of trust and scheduled a properly noticed foreclosure sale. Off-Road prevented the sale by filing an involuntary Chapter 11 petition against BFP. BFP moved to dismiss the involuntary petition, and Imperial moved to lift stay. Both motions were granted on or about June 14, 1989, and the subject property was sold to third parties at a foreclosure sale, apparently without further notice, on July 12, 1989.

Three months later the state court ruled on the quiet title action, rescinding the conveyance between the Foremans and the Pedersens. Thereafter BFP filed a voluntary Chapter 11 petition and brought the instant adversary suit

seeking to nullify the foreclosure sale as a transfer for less than reasonably equivalent value under Section 548(a)(2).

Imperial moved for summary judgment. The bankruptcy court granted the motion, holding that reasonably equivalent value was received at the foreclosure sale and that the foreclosure sale was "regularly conducted.[4]

ISSUE

Whether the bankruptcy court erred in granting Imperial's motion for summary judgment, holding that reasonably equivalent value was received at the foreclosure sale.

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4. The bankruptcy court also held that BFP lacked any interest in the subject property: if the Pedersens had no interest in the property, then BFP had no interest in the property. The court failed to recognize that the same could be said of Imperial's interest in the property. Therefore, we hesitate to use the state court rescission to determine the interests of these parties or to dispose of this appeal.

STANDARD OF REVIEW

We review the granting of a motion for summary judgment de novo. E.g., In re Kirkland, 915 F.2d 1236, 1238 (9th Cir. 1990). We review issues of fact for clear error, and conclusions of law de novo. Pullman-Standard v. Swint, 456 U.S. 273, 277 (1982); Vesey v. United States, 626 F.2d 627, 629 (9th Cir. 1980).

DISCUSSION

Reasonably Equivalent Value

BFP argues that the foreclosure sale should be invalidated or damages awarded pursuant to Section 548(a)(2). BFP argues that the subject property was worth in excess of $700,000, and that the sale prices of $433,000 was not reasonably equivalent value.

The BAP has previously held:

> A non-collusive and regularly conducted nonjudicial foreclosure sale prior to the filing of a bankruptcy case cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes "reasonably equivalent value" as a matter of law.

In re Madrid, 21 B.R. 424 (9th Cir. BAP 1982), aff'd, 725 F.2d 1197 (9th Cir. 1984), cert. denied, 469 U.S. 833 (1974).[5] In other words, the price

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5. On appeal, the Ninth Circuit found that the foreclosure sale was not a transfer, and therefore did not address the issue of reasonably equivalent value. In re Madrid, 725 F.2d 1197, 1199 (9th Cir. 1984). The 1984 Bankruptcy Amendments determined that a foreclosure sale was, after all, a transfer. However, the BAP rule regarding reasonably equivalent value is still applicable. In Re Ehring, 91 B.R. 897, 901 (9th Cir. BAP 1988), aff'd, 900 F.2d 184 (9th Cir. 1990). Contra In re Lindsay, 98 B.R. 983 (Bankr. S.D. Cal. 1989) (the bid price at a foreclosure sale

received at the foreclosure sale is, by definition, reasonably equivalent value unless the foreclosure sale is not "regularly conducted," or unless there is collusion.

Regularly Conducted Foreclosure Sale

BFP argues that it did not receive proper notice of the foreclosure sale.[6] Since the bankruptcy case had been dismissed, proper notice is determined by looking to California law.

The bankruptcy court made the following findings of fact with respect to the foreclosure sale:

> A Notice of Default was recorded on
>
> ---
> ...Continued...
>
> does not establish reasonably equivalent value).

6. BFP also argues that it did not receive proper notice of the motion to lift stay. Imperial argues convincingly that the dismissal of the involuntary bankruptcy petition made notice under the motion to life stay irrelevant.

> July 29, 1988. A Trustee's sale was originally scheduled for December 29, 1988. Notice of the Sale was published for three consecutive weeks as required by the laws of the State of California.
>
> * * *
>
> Imperial did not have any business relationship with the third party purchasers at any time prior to the Trustee's Sale of the subject property, nor did Imperial receive any benefit by virtue of the fact that the property was purchased by a third party at the Trustee's Sale.

Appellant's Excerpts at 244-45. BFP does not challenge these findings, but merely states that it received no notice. Pursuant to California law, publication for three consecutive weeks is sufficient notice, even under the facts of this case where the sale was postponed due to

bankruptcy, and not renoticed after bankruptcy. See Lupertino v. Carbahal, 35 Cal. App. 3d 742, 746-747, 111 Cal. Rptr. 112, 115 (1973).

BFP next argues a kind of estoppel, stating that it was misled by Imperial into believing that the foreclosure sale would not be held until the state court proceedings had concluded.

> Russell Barton's declaration showed that after the hearing on the involuntary petition (the prior petition) filed by Off-Road, he heard the attorney for appellee [Imperial] say that they would not have the foreclosure sale until after the hearing on the pending quiet title action set for July 17, 1989 . . . .

Appellant's Opening Brief at 11. Such an argument does not state a claim for estoppel. Furthermore, Imperial denies

that there was a verbal agreement, and further argues that a verbal agreement to continue a trustee's sale is unenforceable under California law. Appellee's Opening Brief at 22-23. (quoting Karlsen v. American Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 121, 92 Cal. Rptr. 851, 856 (1971)).

BFP has failed to show that the bankruptcy court erred in concluding that reasonably equivalent value was given for the subject property. Therefore, the bankruptcy court order granting summary judgment is AFFIRMED.

VOLINN, Bankruptcy Judge, Dissenting:

Relying on the majority ruling in In re Madrid, 21 B.R. 424 (9th Cir. BAP 1982), aff'd on other grounds, 725 F.2d 1197 (Ninth Cir. 1984), cert. denied, 469 U.S. 833 (1984), the majority here restates the view that a non-collusive and regularly conducted nonjudicial foreclosure sale creates in effect an irrebuttable presumption that the consideration received at such a sale is "reasonably equivalent value" for purposes of Bankruptcy Code Section 548(a)(2)[1] While stare decisis does not require us to follow the BAP ruling in Madrid since that ruling was not adopted by the Circuit on appeal, it is appropriate that the reasoning of that ruling be considered, as evidenced by the majority in the matter before us.[2]

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1. Bankruptcy Code Section 548(a) provides in pertinent part: The trustee may avoid any transfer of an interest of the debtor in property . . . that was made or incurred within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --

. . . .

2(A) received less than a reasonably equivalent value in exchange for such transfer or obligation;

2. When the BAP's decision in Madrid was appealed, the Ninth Circuit declined to adopt the reasoning of the majority and instead affirmed on the grounds that no "transfer" occurred at the time of the foreclosure sale. 725 F.2d at 1200-01. The Ninth Circuit's ruling thereby became the law of the case in Madrid. Thereafter, the 1984 Bankruptcy Amendments revised the Bankruptcy Code's definition of "transfer," now found at 11 U.S.C. Section 101(54), to make it clear that a foreclosure sale is a transfer. See In re Ehring, 900 F.2d 184, 87 (9th Cir. 1990) (where the Ninth Circuit implicitly acknowledged that Congress in the 1984 Amendments reversed the Madrid holding). It is questionable that the displacement by Congress of the Ninth Circuit Madrid ruling served to revive the BAP Madrid decision. Thus, given this history, the present viability of original Madrid is doubtful. See In re Verna, 58 B.R. 246 (Bankr. C.D. Cal. 1986) ("[i]n overruling the Ninth Circuit's Madrid decision, Congress did not reinstate the Ninth Circuit Bankruptcy Appellate Panel's Madrid decision . . . ").

Since the issuance of this Court's 1982 opinion in Madrid, a substantial body of case law had developed in relation to the meaning of the term "reasonably equivalent value" under Code Section 548(a)(2). There have emerged three approaches. The first is that articulated by the Bankruptcy Appellate Panel's Madrid majority in its 1982 decision. A number of bankruptcy courts and one circuit court have followed the BAP's approach on the Section 548(a)(2) question. In the Matter of Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985); In re Verna, 58 B.R. 246 (Bankr. C.D. Cal. 1986); In re Upham, 48 B.R. 695 (Bankr. W.D.N.Y. 1985); and In re Strauser, 50 B.R. 868 (Bankr. N.D. Ohio 1984).[3]

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3. One of the proposed components of the 1984 Bankruptcy Amendments would have adopted the BAP's Madrid rule and

The second line of cases follows the Fifth Circuit's decision in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980), a case decided under Section 67(d) of the prior Bankruptcy Act. This superseded section held that a fraudulent transfer was one where the debtor did not receive "fair consideration," as opposed to the Code's use of the term "reasonably equivalent value." The trial court had found no fraudulent conveyance in a foreclosure sale price which was 57.7% of fair market value. The Fifth Circuit reversed and noted that it found no case in which a court had approved a transaction where property

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...Continued...

established an irrebuttable presumption of reasonably equivalent value in the event of a regularly conducted non-collusive foreclosure sale. The Congress declined to adopt the proposal without explanation and, consequently, the legislative history in this regard is inconclusive.

sold for less than 70% of fair market value. This reasoning has come to stand for a somewhat mechanical analysis of determining whether the price paid at a foreclosure sale is "an acceptable percentage of the fair market value of the property." In re Bundles, 856 F.2d 815, 820 (7th Cir. 1988). The Durrett court's approach has been followed by courts outside the Fifth Circuit. E.g., In re Thrifty Dutchman, Inc., 97 B.R. 101 (Bankr. S.D. Fla. 1988); In re Cole, 81 B.R. 326 (Bankr. E.D. Pa. 1988); Matter of IPI Liberty Village Assoc., 92 B.R. 882 (Bankr. W.D. Mo. 1987).

The third line of cases may now be described as a majority position. The leading cases is In re Bundles, 856 F.2d 815 (7th Cir. 1988). That case reflects, in my view, what should be the law in this area. The Seventh Circuit held:

> In our view, in defining reasonably equivalent value, the court should neither grant a collusive presumption in favor of a purchaser as a regularly conducted, non-conclusive foreclosure sale, nor limit its inquiry to a simple comparison of the sale price to the fair market value. Reasonable equivalence should depend on all the facts of each case.

Id. at 824. Thereafter, the court stated that "[i]t would be appropriate to permit a rebuttable presumption that the price obtained at the foreclosure sale represents reasonably equivalent value" (emphasis in original); that the foreclosure transaction must be examined "in its totality," and specified some of the factors to be considered: "whether there was a fair appraisal of factors to be considered; "whether there was a fair appraisal of the property, whether the

property was advertised widely, and whether competitive bidding was encouraged." Id. This analysis has been adopted, in one form or another, by the courts of appeals for three other circuits that have considered the question. In re Morris Communication NC. Inc., 914 F.2d 458 (4th Cir. 1990); In re Littleton, 888 F.2d 90 (11th Cir. 1989); and In re Hulm, 738 F.2d 323 (8th Cir. 1984), cert. denied, 469 U.S. 990 (1984). Many district and bankruptcy courts follow this case-by-case approach as well. E.g., In re Brown, 119 B.R. 413 (S.D.N.T. 1990); In re Barrett, 118 B.R. 255 (E.D Pa. 1990); In re Pittsburgh Cut Flower Co., Inc., 124 B.R. 451 (Bankr. W.D. Pa. 1991); In re Garrison, 48 B.R. 837 (D. Colo. 1985); In re DeVito, 111 B.R. 529 (Bankr. W.D. Pa. 1990); In re National Environmental Systems Corp., 111 B.R. 4 (Bankr. N.D.H. 1989); In re Lindsay, 98

B.R. 983 (Bankr. S.C. Cal. 1989); In re General Indus., Inc., 79 B.R. 124 (Bankr. D. Mass.1987; In re Pruitt, 72 B.R. 436 (Bankr. E.D.N.Y. 1987). There are variants to re-examination of consideration, as in the case of Barrett v. Commonwealth Federal S&L Assoc., 939 F.2d 20 (3d Cir. 1991) holding that the sale price was subject to a reasonably equivalent test but that the reasonable value was to be measured by other sheriff's sales and not private sales.

In the present case, the trial court utilized Madrid's irrebuttable presumption analysis and therefore did not develop the record in the manner envisioned by the Seventh Circuit in circumstances, I would reverse the bankruptcy court's finding that no fraudulent conveyance occurred, and remand the case for further factual development of the totality of the circumstances relating to the

foreclosure sale.

I therefore respectfully dissent.

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Constitution, Article 1,
Section 8, clauses 1 and 4

"The Congress shall have power to . . . establish . . . uniform laws on the subject of bankruptcies throughout the United States; . . ."

11 U.S.C. Section 101 and 101(54)
now shown as [58](54)

"101. Definitions. In this title . . . 'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;"

11 U.S.C. Section 548
[except (d)(2)(D) enacted in 1990]

Fraudulent transfers and obligations

"(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a

transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this

section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permit such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of

the petition.

(2) In this section --

(A) 'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker[,] financial institution [,] or securities clearing agency that receives a margin payment, as defined in section 741[5] or 761[15] of this title, or settlement payment, as defined in sections 101(34), 741(5), 761(15) of this title, or settlement payment, as defined in section 101(35) or 741(8) of this title, takes for value to the extent of such payment; and

(C) a repo participant that receives a margin payment, as defined in section

741(5) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment."

11 U.S.C. 1107 **Rights, powers, and duties of debtor in possession**

"(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106a) (2), (3), and (4) of this title, of a trustee serving in a case under this chapter."

COPY OF PART OF AVOIDANCE OF FORECLOSURE SALES AS FRAUDULENT CONVEYANCES; ACCOMMODATING STATE AND FEDERAL OBJECTIVES

by SCOTT B. EHRLICH

71 Va.L.R. 932, pages 965-967

"The determinants of forced sale value, however, depend entirely on the state mechanisms for realization of debt collateral. Evidence of forced sale value inevitably requires that the federal courts afford substantial weight to the price actually received at the sale and at regularly conducted, noncollusive sales of similar properties in the same geographical region. Of course, Madrid suggested exactly this approach, yet state foreclosure procedures remain so poorly designed that the price received at foreclosure sales rarely represents a true maximum forced sale value. The solution to this quandary is to shift the

inquiry from comparisons of value received in any particular case to the adequacy of state procedures in achieving an optimum price for the property under the inhibiting circumstances of a forced sale.

The reasoning in Lawyers Title Insurance Corp. v. Madrid[94] is sound, but incomplete, as is the reasoning in Durrett. Madrid adherents correctly assert that in the context of a forced sale, the determination of "reasonably equivalent value" should be closely linked to the actual bid received at a noncollusive, regularly conducted sale.[95] But this approach is only valid if state procedures are properly designed to generate competitive bidding for the

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94. 21 Bankr. 424 (Bankr. 9th Cir. 1982), aff'd, 725 F.2d 1197 (9th Cir.), cert. denied, 105 S.Ct. 125 (1984).

95. See supra note 8 for courts following Madrid.

property. Durrett adherents are equally correct in asserting that section 548(a)(2) requires a comparison between the price received at the foreclosure sale and the actual value of the property. This view, however, is only appropriate if state procedures are inadequately designed to maximize the sale price of the property, given the involuntary nature of the sale and the state's interest in assuring mortgages an expeditious and final mechanism for resorting to their collateral.

Recognizing the flaws in the Madrid and Durrett approaches to section 548(a)(2) is the first step in accommodating both state and federal objectives. In applying the presumptive fraud provisions of the Bankruptcy Code, federal courts must be sensitive to the context in which the transfer occurred and the disruptive effects of postforeclosure

avoidance on real estate transactions. The courts should limit the scope of section 548(a)(2) review to an initial evaluation of the state foreclosure procedures, rather than to the quantitative sufficiency of the bid received at sale. If the procedures were adequately structured to produce a competitive bid and the sale was regularly conducted, federal courts should presume that the amount paid for the debtor's interest was reasonably equivalent, regardless of any disparity between retail market value and the price bid at the sale. Under this approach, the interests of debtors cannot be involuntarily transferred under state law free from recapture under section 548(a)(2) except under circumstances structured to maximize the value given in exchange for the property.

Moreover, the state's concern for stability and finality can be satisfied

where the state has adopted foreclosure procedures that maximize sale value and offer to the debtor's creditors the protections of a marketplace transaction. If the foreclosure procedures are value-maximizing, purchasers at foreclosure sles need not be unduly concerned about the possibility of subsequent rescission under the presumptive fraud provisions of section 548(a)(2). By definition, the value paid reflects the best value achievable under the circumstances of a forced sale. Determining the sufficiency of state foreclosure procedures will not require a case-by-case analysis; instead, this inquiry into foreclosure procedures will generate rules of law on which future market participants can rely. Moreover, if state procedures are upgraded to market the property effectively and to increase the number of prospective purchasers attending the sale, the value

paid by the highest bidder will be closer to the nonforced-sale fair market value of the property, thus reducing further the justification for avoiding the sale as a fraudulent conveyance.

This approach will impose a double burden on the bankruptcy trustee. The trustee will have to meet the initial burden of proving that state foreclosure procedures are insufficiently structured to produce a maximum forced sale price. Where state foreclosure procedures are inadequate, the trustee must also prove that the sale price was less than a reasonably equivalent value. In making this determination, however, the courts must recognize that due to the failings of state procedures, no rational forced sale value is available for comparative use, and the courts should apply section 548 strictly, using the retail market value of the proeprty for comparative

purposes. Although this may allow trustees occasionally to succeed in their current efforts to avoid foreclosures, if enforcement of section 548 induces state legislatures to upgrade foreclosure procedures, the trustee's ability to avoid fraudulent conveyances under section 548 eventually will be diminished and the spectre of unstable foreclosure-acquired titles removed. Such a scenario is highly desirable and the federal courts should continue, as many have done, to enforce section 548 in accordance with its terms until state procedures are revamped."

JURISDICTION OF INTERVENING COURTS

The District Court had jurisdiction of the appeal from the Order of the Bankruptcy Court dismissing as to PAUL OSBORNE and other individual defendants. The Order of the Bankruptcy Court was entered on March 8, 1990, and the "Second Notice of Appeal" was filed on March 14, 1990. The District Court had jurisdiction under 28 U.S.C. Section 158(a) and Bankruptcy Rule 8001(a).

The Bankruptcy Appellate Panel (BAP herein) had jurisdiction of the appeal from the Summary Judgment and Judgment on the Pleadings in favor of Imperial Savings & Loan Association. That Summary Judgment was entered on July 10, 1990 and the Notice of Appeal was filed on July 20, 1990. Jurisdiction of the BAP is provided by 28 U.S.C. Section 158(b) and Bankruptcy Rule 8002.

The Court of Appeal had jurisdiction

of the appeal from the District Court. The District Court's Decision was entered April 8, 1991. A Motion for Rehearing was filed on April 12, 1991, and the latter was denied by Order entered May 6, 1991. The Notice of Appeal was filed on May 9, 1991. The Court of Appeal's jurisdiction is provided by 28 U.S.C. Section 158(d) and the appeal was timely under Rules of Appellate Procedure Rule 4(a) and (b) and Bankruptcy Rule 8015.

The Court of Appeal had jurisdiction of the appeal from the BAP. The latter's Opinion was filed November 5, 1991 and the Notice of Appeal filed November 15, 1991. The Opinion of the BAP is an appealable order as provided in 28 U.S.C. Section 158(a) and (b), and Appellate jurisdiction in the Court of Appeal is provided in 28 U.S.C. Section 158(d).

PROOF OF SERVICE

I am a resident of the County of Orange, State of California; I am over the age of 18 years and not a party to the within action. My business address is 113 Via Venezia, Newport Beach, CA 92663.

On February 15, 1993, I served the foregoing document described as PETITION FOR WRIT OF CERTIORARI AND APPENDIX on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Michael R. Sment, Esq., Rich & Ezer, 1888 Century Park East, Suite 2020, Los Angeles, CA 90067

Robert F. Kidd, Esq., Graham & James, 1 Maritime Plaza, Suite 300, San Francisco, CA 94111

(XX) By depositing such envelope(s) and contents, with postage thereon fully prepaid, in the United States mail, at Newport Beach, CA addressed as shown above.

Executed on February 15, 1993, at Newport Beach, California.

I declare that I am a member of the bar of this Court or am employed in the office of a member of the bar of this court at whose direction the service was made.

_____
ROY B. WOOLSEY

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